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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 03 2011

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, on January 16, 2008. The petitioner filed an appeal on February 19, 2008. The Administrative Appeals Office (AAO) rejected the appeal on April 7, 2001, finding it to be late. The petitioner filed a motion to reopen on May 5, 2010. The AAO notes that it will only be issuing one decision regarding this matter. The AAO finds that the motion was properly filed according to 8 C.F.R. § 103.5(a)(2) and (3). The AAO notified the petitioner that it was sua sponte reopening the case on November 19, 2010, finding that the appeal was timely filed and offering the petitioner an opportunity to submit a new brief. The petitioner notified the AAO that it was declining to submit an additional brief on December 11, 2010. The appeal will be dismissed.

The petitioner is a university. It seeks to employ the beneficiary permanently in the United States as an assistant professor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the requisite 36 months of experience in the proffered position and the requisite 36 months of relevant construction management experience before the priority date of March 24, 2006. The director denied the petition accordingly.[1]

The record demonstrates that the appeal was properly filed, was timely, and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated January 16, 2008, the single issue in this case is whether or not the beneficiary possessed the requisite 36 months of experience in the proffered position and the requisite 36 months of relevant construction management experience before the priority date of March 24, 2006.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Here, the ETA Form 9089 was accepted on March 24, 2006 and certified on September 1, 2006. The ETA Form 9089 states that the position requires a doctorate in engineering and 36 months of experience in the job offered, assistant professor. Part H Section 14 of the ETA Form 9089 lists the

[1] The AAO notes that the beneficiary has subsequently received approval for a Form I-140 petition for a different employer.

specific skills or other requirements needed for the position. The petitioner specified that at least 36 months of relevant construction management experience are required for the position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of ETA Form 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is March 24, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The AAO finds that the petitioner has demonstrated that the beneficiary possesses the requisite education for the position. The petitioner has provided a copy of the beneficiary's 2005 Ph.D. in civil engineering degree from the [redacted]. However, the petitioner has failed to demonstrate that the beneficiary has the required experience.

On the ETA Form 9089, signed by the beneficiary on September 8, 2006, the beneficiary claimed to have worked for the petitioner as an assistant professor since August 2005, approximately seven months before the priority date.

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[2] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The beneficiary claimed to have worked for the [redacted] in Urbana as a teaching/research assistant from August 2002 to June 2005; for [redacted] in Cairo, Egypt as an engineering consulting managing partner from September 2000 to August 2001; for [redacted] in Cairo, Egypt as a construction company engineer from August 1999 to September 2000; for [redacted] in Cairo, Egypt as a construction company junior engineer from February 1999 to August 1999; for [redacted] in Cairo, Egypt as a construction company trainee from May 1998 to August 1998; and for [redacted] in Dubai, United Arab Emirates as a construction company trainee from May 1997 to August 1997.

The AAO notes that the beneficiary was obtaining his Ph.D. while he worked only part-time for the University of Illinois. He also did not work as an assistant professor for that university, but rather as a teaching/research assistant.

The AAO also highlights the fact that the beneficiary only indicated that he possessed one year of construction management experience as required by the labor certification due to his employment for AES Engineering Services as a managing partner. He indicated that he possessed another two years of construction experience, but not construction management experience.

On appeal, the petitioner states that the beneficiary possesses the requisite experience for the position from his university level work experience to his three years of experience in construction. The petitioner asserts that it inadvertently indicated on the labor certification that three years of experience in the proffered position were necessary. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner provides copies of print and on-line advertisements for the position, which only required a minimum of three years of relevant construction management experience. The advertisements did not state that experience as an assistant professor was necessary. The petitioner seeks to combine the beneficiary's academic and construction employment to meet the 36-month experience requirement.

The petitioner has provided only three letters confirming the beneficiary's prior construction employment experience. The letters are from [redacted], [redacted], and [redacted] for a total of only approximately 2-and-a-half years experience.

The petitioner has provided a letter from the [redacted] confirming that the beneficiary worked there as a teaching/research assistant between the summer of 2002 and the summer of 2005. The AAO finds that the beneficiary's employment there was only part-time in nature and was not in the proffered position. It was also gained prior to the beneficiary's receipt of his Ph.D.

The petitioner provided a letter confirming its employment of the beneficiary in the proffered position since August 2005. The AAO notes that the beneficiary only worked in this position for approximately seven months before the priority date.

The petitioner did not submit any other letters or evidence to document that the beneficiary met the terms of the certified labor certification. The petitioner has not demonstrated that the beneficiary possesses the requisite experience of 36 months in the proffered position and the 36 months of relevant construction management experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.